National Labor Relations Board Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

October 14, 2005 W-3021

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Elmhurst Care Center (29-CA-22674, 29-CB-10843; 345 NLRB No. 98) Queens, NY Sept. 30, 2005. Chairman Battista and Member Schaumber affirmed the administrative law judge's finding that the Respondent Employer extended, and the Respondent Union Production Service and Sales District Council Local 300S accepted, recognition prematurely, in violation of Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act. The majority, agreeing with the judge that the grant of recognition was premature because the Employer was not then engaged in normal business operations, found it unnecessary to pass on his finding that the Employer did not at that time employ a substantial and representative complement of its projected work force.

[HTML] [PDF]

Member Liebman, dissenting, would find the Employer's recognition of the Respondent Union was lawful and would dismiss the complaint.

The majority noted that the Board has long held that an employer's voluntary recognition of a union is lawful only if, at the time of recognition, the employer: (1) employed a substantial and representative complement of its projected workforce, and (2) was engaged in its normal business operations. See, e.g., *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984). If either prong is not met, a grant of recognition is unlawful. See *A.M.A. Leasing*, 283 NLRB 1017, 1024 (1987) (a finding that the employer "was not engaged in normal business operations . . . would alone establish a violation"). Here, the majority found that at the time of recognition the Employer was involved in preparation for the opening of the facility; it was not engaged in "normal business operations." It wrote:

Our dissenting colleague contends that a nursing home is engaged in 'normal business operations' when it trains employees for an upcoming start of operations. Respectfully, our colleague's position is at odds with the words she interprets. A nursing home is in the business of caring for patients—24/7. Training and setting up shop a few hours a week in preparation for doing so is simply not normal operations. Normal operations for a nursing home ordinarily begin when patients are admitted and the demands attendant thereto are felt.

Member Liebman noted that when the Employer recognized the Respondent Union, 54 percent of its ultimate employment complement was working, in 100 percent of the Employer's job classifications, which was a "substantial and representative complement" of workers. She found that the "normal business operations" test, which survives only in the unfair labor practice context, serves no clear statutory purpose and should be revisited by the Board. In any event, Member Liebman found that the requirement was satisfied, saying: "While the Employer's facility, a nursing home, was not yet open for business, some employees were effectively doing their jobs already (housekeepers and dietary employees), while others (a Licensed Practice Nurse and Certified Nurses Aides) were in substantial training, in preparation for the home's opening."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Service Employees Local 1115; complaint alleged violation of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2). Hearing at New York on Oct. 12, 1999. Adm. Law Judge Joel P. Biblowitz issued his decision Jan. 21, 2000.

LeMoyne-Owen College (26-CA-20953; 345 NLRB No. 93) Memphis, TN Sept. 30, 2005. This supplemental decision follows a remand from the U.S. Court of Appeals for the District of Columbia Circuit of the Board's previous decision reported at 338 NLRB No. 92 (2003). The court remanded the case for further proceedings, finding that the Board failed to address "how its disposition is consistent with its contrary holdings in the post-Yeshiva cases that appear to have presented similar facts." The issue presented here is whether the faculty at LeMoyne-Owen College (the College) are managerial employees under NLRB v. Yeshiva University, 444 U.S. 672 (1980), and subsequent Board precedent applying Yeshiva. [HTML] [PDF]

After consideration of the record and the position statements filed by the parties, Chairman Battista and Member Schaumber determined that the faculty exercise substantial authority in a majority of critical areas identified in *Yeshiva* and subsequent cases applying it; that the faculty play a major and effective role in the formulation and effectuation of management policies at the College; and therefore, faculty members are managerial employees and excluded from coverage under the Act. Accordingly, the majority dismissed the complaint in Case 26-CA-30592; reopened Case 25-RC-10120; vacated the Union's certification in Case 25-RC-1020 issued on September 17, 2002, and dismissed the petition.

In her dissenting opinion, Member Liebman wrote:

[T]he U.S. Court of Appeals for the District of Columbia Circuit has asked the Board to supply a reasoned explanation for why this case is different from previous decisions in which the Board concluded that faculty members were managerial employees. . . . The majority neglects the principle that statutory exclusions must be interpreted narrowly to avoid denying rights, which the Act is intended to protect. Instead, the majority (1) broadly interprets previous cases finding managerial status and concludes that those cases dictate a finding of managerial status here, and (2) relies on evidence concerning the effectiveness of the faculty's recommendations with regard to curriculum and other matters that is far too thin to support a finding of managerial status.

Member Liebman concluded that the College has not met its burden of proof and has not adduced sufficient evidence that the faculty's recommendations are actually effective. Thus, she would reaffirm the Board's prior decision and find that the College has violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

In its earlier decision, the Board found that the College violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the employees' certified representative and ordered the College to recognize and bargain with the Faculty Organization, Lemoyne-Owen College (the Union).

(Chairman Battista and Members Liebman and Schaumber participated.)

Millard Refrigerated Services, Inc. (18-RC-16665; 345 NLRB No. 95) Ottumwa, IA Sept. 30, 2005. Chairman Battista and Member Schaumber, sustaining the Employer's objections regarding prounion supervisory conduct, set aside the election of June 23, 2000, and directed that a new election be held. The tally of ballots showed 29 for and 22 against, the Petitioner, Food & Commercial Workers Local 230, with 8 challenged ballots, a number sufficient to affect the outcome of the election. Member Liebman dissented, arguing that Harborside was wrongly decided and that, even if it were correctly decided, it should not be applied retroactively. [HTML] [PDF]

The majority stated:

We find that the prounion supervisory solicitations, threats, and interrogations established in this case, considered together, and in light of the supervisors' broad authority over the unit employees, are objectionable under *Harborside* and are sufficient to materially affect the election results . . .

The Employer contended that the hearing officer erred in finding no objectionable conduct and excepted to the hearing officer's overruling its Objections 1 and 3. Objection 1(a) involved the solicitation of union authorization cards; Objection 1(d) dealt with threats of reprisals; and Objection 1(e) involved interrogations by supervisors. Chairman Battista and Member Schaumber determined that these objections were meritorious and, therefore, found it unnecessary to pass on the remainder of the Employer's objections.

The Petitioner sought to represent a unit of all of the Employer's production and maintenance employees, including those referred to by the hearing officer as "leads" and "assistant leads." The Employer challenged the ballots of six leads on the basis that they are statutory supervisors. The hearing officer recommended that the challenges to the ballots be sustained. In the absence of exceptions to this recommendation, the majority adopted the hearing officer's recommendation, finding that the six leads were supervisors as defined in Section 2(11) of the Act. The remaining challenges are no longer determinative of the election result.

In dissent, Member Liebman contended that her colleagues erred in setting aside the election "largely because some supervisors gave union authorization cards to some employees" and in sustaining the Employer's objections to the election "based on alleged threats of reprisal and interrogations by prounion supervisors." She agreed with the hearing officer's finding that there was no evidence of threats of reprisal or promise of benefit in conjunction with the supervisors' providing cards and for not supporting the Union. On the issue of the alleged interrogation, she asserted that the questioning of employees by prounion supervisors was not accompanied by any threats of retaliation or promises of reward. Member Liebman agreed with the hearing officer's overruling of the objections and would issue the Union a certification of representative.

(Chairman Battista and Members Liebman and Schaumber participated.)

Operating Engineers Local 150 (33-CD-444, 445; 345 NLRB No. 94) Belvidere, IL Sept. 30, 2005. Relying on the factors of collective-bargaining agreements, employer preference, employer past practice, prior cases, and economy and efficiency of operations, the Board determined that employees of R&D Thiel, a Division of Carpenter Contractors of America, Inc., represented by Teamsters Local 325 are entitled to operate cranes or crane trucks, at R&D Thiel's jobsites that gave rise to this proceeding, to hoist or lower materials or equipment onto scaffolds, building structures, or into place. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Siemens Building Technologies, Inc. (3-CA-24050, 24304; 345 NLRB No. 91) Rochester, NY Sept. 30, 2005. The Board adopted the recommendation of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Operating Engineers Local 852, and violated Section 8(a)(1) when it conducted an unlawful poll as to whether its employees wished to be represented by the Union or not. [HTML] [PDF]

The Board found that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful refusal to recognize and bargain with the Union. Accordingly, it set forth an affirmative bargaining order with a temporary decertification bar to fully remedy the violations found. Because the judge inadvertently failed to include a description of the appropriate bargaining unit in his decision, the Board modified the order to include such appropriate unit.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 832; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo, Oct. 6-8, 2003. Adm. Law Judge Martin J. Linsky issued his decision Feb. 25, 2004.

Teamsters Local 688 (14-CB-9771; 345 NLRB No. 96) Bridgeton, MO Sept. 30, 2005. Chairman Battista and Member Schaumber adopted the administrative law judge's finding that Teamsters Local 688 violated Section 8(b)(1)(A) of the Act by threatening its members with intraunion disciplinary proceedings, initiating and prosecuting intraunion disciplinary proceedings, and then fining members who refused to join a sympathy strike or honor third-party picket lines, in contravention of a contractual no-strike provision contained in the Union's collective-bargaining agreement with Frito Lay. Member Liebman dissented. [HTML] [PDF]

The judge, applying the standards set forth in *Indianapolis Power Co.*, 291 NLRB 1039, 1041 (1988), enfd. 898 F.2d 524 (7th cir. 1990), found that because article 18 contained a broad no-strike clause covering "any strikes," absent contrary evidence, the clause bars sympathy

strikes. The judge next found that article 17, which allowed an employee to honor a third-party picket line without fear of discipline, did not demonstrate a contrary intent and, when read together with article 18, article 17 allows an individual employee to make a personal decision as whether to honor a third-party picket line. The judge reasoned that to allow the Respondent to fine members for crossing a stranger's picket line would eliminate the voluntary intent of article 17 and render meaningless the clear language of article 18.

The majority agreed with the judge and held that: there is no extrinsic evidence in the record demonstrating that the parties intended to allow sympathy strikes; the Union has a contractual obligation under article 18 to refrain from authorizing *any* strike, including sympathy strikes or work stoppages; and article 17 protects individual employees from discharge or disciplinary action in the event the employee wished not to cross a third-party picket line. They concluded: "Article 17 protects *the employee* who wishes to honor the picket line, i.e., who refuses to perform work; article 18 prohibits *the Union* from authorizing employees to not to perform work. In the instant case, the Union not only authorized employees to honor the picket line, thus, stopping work, it coerced them into doing so." The majority stated further: "[W]e find that article 18 means what it says and that the Respondent violated Section 8(b)(1)(A) by threatening to discipline, and then disciplining, its members because they refused to engage in activity that violated the collective-bargaining agreement."

Contrary to her colleagues, Member Liebman contended that neither article 17, nor article 18 imposed any restriction on the Union's right to discipline members for failing to honor a picket line, which the Union determines should be respected. She further asserted:

Nothing in the contract establishes that the Union clearly and unmistakably waived the right of employees to honor third-party picket lines—just the opposite. Article 17 establishes that right and provides that its exercise 'shall not be a violation' of the contract. Accordingly, I would find that the Union's actions, which did no more than compel its members to exercise a contractual right that the Union negotiated for them, were lawful, and I would dismiss the complaint.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Frito-Lay, Inc.; complaint alleged violation of Section 8(b)(1)(A). Hearing at St. Louis on Oct. 25, 2004. Adm. Law Judge Mark D. Rubin issued his decision Jan. 14, 2005.

U Ocean Palace Pavilion, Inc. (29-CA-25985; 345 NLRB No. 97) Brooklyn, NY Sept. 30, 2005. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by refusing to hire or to consider for hire Zi Zhen Yang, Soon Bo

Huang, Lian Fu Liang, Xia Ming Tan, Jun Jie Liang, Xin Ce Chen, and Jue Hui Mei because <a href="https://example.com/instances/learned-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-searce-new-to-

they concertedly filed and maintained a lawsuit under the Fair Labor Standards Act or the New York Labor Law, or because they engaged in other concerted activities protected by the Act.

In adopting the judge's finding of a violation, Member Schaumber did not rely on restaurant manager Wing Kuen Tsoi's statement, made during the course of settlement discussions, that Tsoi would hire employee Soon Bo Huang if Huang would agree to drop his pending wage-and-hours claims. In Member Schaumber view, Tsoi's statement was consistent with legitimate settlement efforts, and does not evidence unlawful motivation on the Respondent's part in failing to hire the alleged discriminatees. Member Schaumber also does not rely on the judge's adverse inference against the Respondent for not calling Hing Ching and Kar Ng to corroborate Tsoi's testimony on several factual matters. He noted: "Where the testimony of other witnesses simply would be cumulative of testimony already offered, the failure to call additional corroborative witnesses does not support an adverse inference." See *McCormick on Evidence* at § 272 (3d ed. 1984).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Zi Zheng Yang, an Individual; complaint alleged violation of Section 8(a)(1). Hearing held Aug. 10-12, 2004. Adm. Law Judge Steven Fish issued his decision Nov. 19, 2004.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Renal Care of Buffalo, Inc. (Communications Workers Local 1168) Buffalo, NY October 3, 2005. 3-CA-24947, et al.; JD-76-05, Judge Bruce D. Rosenstein.

Letter Carriers, Branch 1227 (Individuals) Wichita Falls, TX October 7, 2005. 16-CB-6815, 6874; JD(ATL)-44-05, Judge Keltner W. Locke.

Armstrong Machine Co., Inc. (Food & Commercial Workers Local 6) Pocahontas, IA October 7, 2005. 18-CA-16276-1 (E), 16555-1(E); JD(ATL)-45-05, Judge Keltner W. Locke.

U-Haul Co. of Nevada, Inc. and U-Haul International, Inc., et al. (Machinists Local 845 and an Individual) Las Vegas, NV September 30, 2005. 28-CA-18575, et al.; JD(SF)-65-05, Judge John J. McCarrick.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Mid-American Gunite, Inc. (Teamsters Local 142) (13-CA-42309; 345 NLRB No. 92) Griffith, IN September 30, 2005. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Fast Air of Florida, Inc., Port Richey, FL, 12-RC-9130, October 3, 2005 (Chairman Battista and Members Liebman and Schaumber)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

American Red Cross Blood Services New England Region, Boston, MA, 1-RC-21878, October 6, 2005 (Chairman Battista and Members Liebman and Schaumber)
